

***United States Court of Appeals
for the Second Circuit***



**APPELLEE'S
APPENDIX**

Orig. w/ affidavit of mailing

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75-1233

**United States Court of Appeals
FOR THE SECOND CIRCUIT**

Docket No. 75-1233

UNITED STATES OF AMERICA,

Appellee,

—against—

DAVID HERNDON,

Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

GOVERNMENT'S APPENDIX

DAVID G. TRAGER,
*United States Attorney,
Eastern District of New York.*



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Elie - direct

has pointed out the defendant, David Herndon.

Q What did the defendant do after you made that phone call?

A He came in close to me.

Q Would you speak up, please, so the jury can hear you?

A He came in close to me.

Q Did he say anything to you at that time?

A Yes.

Q What did he say to you?

A He pulled his jacket, take a gun out and said "This is a stickup. Give me all the money or I'll blow your head off."

Q Where were you standing -- you were standing on the left side, still, at that point?

A Yes.

Q Was your back to the wall?

A Yes.

Q Where was the defendant with respect to you?

A On the left side and his right shoulder turned to the right side of the bank.

Q You said he pulled his jacket open. Would you indicate to the jury exactly what he did at that point?

A (Indicating) He pulled his jacket like this,

then pulled the gun out with the right hand.

MR. CORCORAN: I would like this marked for identification, please.

THE CLERK: Object marked for identification, Government's Exhibit 5.

(Is marked.)

Q Mr. Elie, would you examine Government's Exhibit 5 for identification (handing to witness).

(Pause.)

Q (Cont'g) Have you seen that object before?

A Yes.

Q Can you identify that?

A This is the gun he pulled out and this is the same gun the patrolman take off of his pocket on the same day.

Q Would you demonstrate to the jury again where exactly was that gun when you first saw it?

A Inside the bank.

Q Would you stand up a second and show the jury what the defendant did with that?

A (Indicating) He pulled a jacket like this and then pulled the gun like that. Then he said "This is a stick-up. Give me all the money in the bank or I'll blow your head off."

Q Did you say anything to the defendant at that time?

32 Elie - direct

Q Did you follow the defendant at that point?

A Yes.

Q For how long did you follow him?

A Twenty minutes.

Q Where did the defendant go?

A From the bank across the street.

Q Then where did he go?

A Then he crossed the street back again, a little bit down after a little bit down to the Chemical Savings Bank.

Q Were you running at this point?

A Yes.

Q Was this on Flatbush Avenue in Brooklyn?

A Yes.

Q What occurred after that?

A Then, when I stop him he said, "We are brothers. Let's forget it."

Q What happened after then?

A I told him "I'm doing my job and second, I don't believe in brothers." That's what I tell him.

Q What occurred after that?

A He goes straight to the subway station, take a token out of his pocket, go downstairs, go to the underpass, go to the uptown side. He get on the -- tried to get on the

Lexington train. He get out, go upstairs back to the street again, across the street to the Con Edison place. That's when I see the two patrolmen. They stop him.

Q At that point you saw a patrolman stop him?

A Yes.

MR. CONCORAN: Could we have these marked for identification?

THE CLERK: Black case marked Government's Exhibit 6 for identification.

(So marked.)

THE CLERK: Two objects marked Government's Exhibits 7 and 8 for identification.

(So marked.)

Q Mr. Elie, would you examine Government's Exhibit 6 for identification (handing to witness). Have you ever seen that object before?

A Yes.

Q Tell us when you had seen it before.

A On October 28.

Q Where did you see it on October 28?

A Inside the bank.

Q Where did you see it inside the bank?

A He was wearing that bag.

Q Who was holding it?

Cirrincone-direct

southbound side of the Nevins Street station.

Q Is that here in Brooklyn?

A Yes, sir.

Q What if anything occurred at 2:00 o'clock on that platform?

A Two male blacks came running down the stairs and they ran past me and they headed to the underpassage to the northbound side.

As they were coming up on the northbound side, I heard people from the mezzanine area yelling "Stop him, stop him, he's got a gun, he trie ' to rob the bank." I ran upstairs to Flatbush Avenue.

Q Before you ran up the stairs, when you heard that yelling, were you able to observe two men who were running?

A Yes, they had come out of the underpassage on the northbound side of the station and they were running down the platform towards the stairway.

THE COURT: In that subway station you can cross from the north to the south or south to the north underneath the sidewalk, the underpass; is that right?

THE WITNESS: Yes sir. The whole station is underground.

THE COURT: I understand, but pedestrians can

Cirrincone-direct

walk down the steps, under the roadway, and up the steps?

THE WITNESS: No sir, you have to pay your fare.

THE COURT: I see.

Q At the time you heard this yelling the two men were on the opposite platform from you; is that correct?

A Yes sir.

Q What did you do at that point?

A I ran up to the street to Flatbush Avenue.

Q Did you see anything when you got up to the street?

A I observed the first male running across Flatbush Avenue to my side of the street. He stopped, turned, looked at me and he started to run in the direction of Nevins Street. I gave chase and when he got to Nevins Street he made a left-hand turn and I made a left-hand turn.

Q What if anything occurred at that point?

A At that point I came up behind him, put my hands on his two arms, put him up against the wall. He dropped a black leather case he was carrying.

Q You caught up with him around the corner?

A Yes sir, at that point.

Q Do you see the man on the corner of Nevins

1 Street here in the courtroom today?

2 A Yes sir.

3 Q Would you point him out?

4 A (Indicating) Sitting at that table.

5 THE COURT: Let the record show the witness
6 pointed out the defendant, David Herndon.

7 Q What happened once you caught up with the
8 defendant?

9 A The second male came up and he says, "He's
10 got a gun. He got a gun. He's tried to kill me." I said,
11 "Okay, I have him." We placed him up against the wall. I
12 put his hands up in the air, gave him a pat search. I felt
13 an object in his right-hand pocket. I removed the object,
14 a simulated gun.

15 Q Officer, would you examine Government's
16 Exhibit 5 marked for identification (handing to witness)?
17 Can you identify that?

18 A Yes sir.

19 Q How can you identify that?

20 A I scratched my initials on the right-hand
21 side.

22 Q Have you seen that before then?

23 A Yes, I removed it from the defendant.

24 Q When was that?

25 A At Nevins Street when I had him up against

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Herndon-direct

1 A I left for work. I went to work and --

2 Q At this law clinic?

3 A Yes.

4 MR. CORCORAN: Objection, your Honor.

5 THE COURT: Overruled. I'll allow it.

6 Q At what time was that, if you recall?

7 A I got to work about 9:30 and I left about
8 11:45.

9 Q Would you describe what happened, why you left,
10 when you left, what you did?

11 A The reason I left, I was feeling kind of
12 pressured. I had the previous weekend -- I had a little
13 business deal go sour on me. I tried to do, to take part,
14 invest a few hundred dollars in it and it fell through and
15 I had other money problems and at the time I couldn't function
16 at work properly, so I left.

17 I came across town on my way to my sister's house. I
18 met a man and we were talking and after that point we got
19 high. We went to his house and got high.

20 Q What time was that?

21 A 10 after 12, something like that.

22 Q What happened at that point?

23 A We got high in his house. We had a couple of
24 cups of tea and then I left. I was going back to work and
25

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Herndon-direct

2 I was sort of down and I passed by the New York Savings
3 Bank.

4 Q Did you ever pass by that bank before?

5 A Several times. Should I go on?

6 I looked in the bank. It wasn't crowded and whatnot.

7 I got the idea of that's the way to get money if you need it;
8 so.

9 Q Was there anything you specific you thought
10 of about the Greater New York Savings Bank?

11 A When I passed by, there were not many people
12 there at all. I decided to rob a bank.

13 Q What did you do?

14 A I went to a 5 and 10, bought a toy pistol.

15 Q Where was this 5 and 10?

16 A I don't remember the exact location, but I
17 think it was at Lamston's and I bought the pistol and started
18 walking back to the bank.

19 Q Yes?

20 A Yes.

21 Q Is this the one you purchased (indicating)?

22 A Yes.

23 Q Do you recall how much it cost?

24 A \$1.99.

25 Q What did you do with that pistol?

129 Herndon-direct

2 A After I unwrapped it, I stuck it in my
3 pocket.

4 Q What did you do then?

5 A I walked to the Greater New York Savings Bank
6 and walked into it and --

7 Q Do you recall who was in the Savings Bank
8 at that time?

9 A When I walked into the bank, it was 4 tellers,
10 the guard and a customer.

11 Q Do you recall where each of these individuals
12 were?

13 A The customer was standing at the teller's cage.
14 The rest of the tellers were at their cages, different cages,
15 on the right side, I think.

16 Q Were they spread out or around the bank or
17 were they altogether --

18 A Spread out around the bank.

19 Q Then what happened -- at this particular time
20 if you can recall, would you describe what was going on
21 in your mind?

22 A At that point, I was thinking whether I should
23 do it or how should I do it and will I get caught. At that
24 point, that's what I was thinking when I walked into the bank.
25 I checked to see whether the bank guard had a gun,

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Herndon-direct

A 12

how many bank guards were there. There was only one and he was -- at the time I was in the bank, there was a desk or something, a station over there where the bank guard is at. I walked over to the spot where you get the withdrawal slips, deposit slips. I started -- I pulled one out and I started like writing on it.

(Continued next page.)

2 Q Why did you do that?

3 A I wanted to look around the bank. I wasn't
4 sure if I really wanted to do it yet. I wasn't all the
5 way into it. I hadn't built up enough heart to do it at that
6 point. The bank guard walked over to me.

7 Q The bank guard is this Mr. Elie who testified
8 this morning?

9 A Yes, he walked over to me. When he walked over
10 to me, I asked him to get me a glass of water. He left me,
11 went to the back of the bank and was gone about three minutes,
12 right?

13 Q While he's walking, I told myself, "If you're going to
14 do it, do it now or forget it."

15 Q What was going on at the bank at that time?

16 A There wasn't any customers in the bank at all
17 and like it was the best opportunity to do it if I wanted to,
18 right?

19 Q Where was Mr. Elie?

20 A In the back of the bank.

21 Q Was he visible to you?

22 A No, he wasn't. He came back out. I told him
23 I wasn't feeling too well. I told him I had high blood
24 pressure, right? I sat down. I got back up and asked him to
25 get me another glass of water.

Q Why did you do that?

A Well, I had changed my mind about doing the bank robbery and I knew that I had told him I was ill and I had to go through with it or he would think something was funny. He went to get me another glass of water. When he came back, he went over to the phone.

Q Where was this phone?

A It was on the desk, about ten feet from where we were standing. When he came back over to me, he said, "I called your ambulance, man." I, at that point, I knew I had to get out of the bank, right?

Q Why?

A Well, the ambulance, police come. I knew I couldn't stand any questions about what I was doing in the bank. I left -- I started going out the bank, right? The bank guard --

Q Did you walk out of the bank or did you run out?

A I was walking fast. I was walking fast. When I left the bank, outside the bank, the bank guard stopped me. He said, "Hey man, I called you an ambulance and I want you to talk to my boss." I said, "No, man, that's all right." I started walking faster. He kept following me. I started walking even faster; then it broke into a trot. I ran across the street and down the street. He was still following me.

Herndon-cross

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Q After the first glass of water?

A Yes, after the first glass.

Q But you decided to have a second glass of water?

A Right.

Q Were you thirsty at the time?

A Sort of.

Q It's your testimony then that you never pulled this pistol out in the bank?

A I never pulled it out in the bank, right.

Q Is it your testimony here -- Let me ask you this: Did you say to Mr. Elie, "This is a stick-up, give me all the money in the bank or I'll blow your head off"?

A No, I didn't.

Q He made that up?

A Yes, he did.

Q He told the truth about everything else, but he made that up --

THE COURT: Objection sustained. Tat's argu-

mentative.

Q When was the first time you took this pistol out after you walked into the bank?

A I never took it out. The policeman pulled it out of my pocket.

Q It remained in your pocket from the time you

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA

-against-

DAVID L. BROWN,

Defendant.

75 CR 100

United States Courthouse
Brooklyn, New York

June 6, 1975
10:50 a.m.

B e f o r e :

HONORABLE JACOB MISHLER, Chief U.S.D.J.

ARLYNE SEGAL
ACTING OFFICIAL COURT REPORTER

Appearances:

DAVID G. FRAGER, ESQ.
United States Attorney
for the Eastern District of New York

BY: DAVID GOULD, ESQ.
Assistant United States Attorney

MARION BELTZER, ESQ.
Legal Aid Society
Attorney for Defendant

1 THE CLERK: Criminal cause for sentencing
2 U.S.A. against David Herndon, 75 CR 192.

3 MR. GOULD: David Gould, Assistant United
4 States Attorney, substituting for Mr. Cochran who is
5 on vacation.

6 MS. SELTZER: Marion Seltzer, for the Legal
7 Aid Society, for the defendant David Herndon.

8 THE COURT: David Herndon, do you have anything
9 to say before the Court imposes sentence on you?

10 THE DEFENDANT: Ms. Seltzer would like to
11 speak before you impose sentence.

12 THE COURT: Is there anything particular that
13 you would like to say? The law allows you to speak
14 before sentence is imposed. You have a right to
15 speak. You have a right to allocution.

16 Do you want to say anything at this point?

17 THE DEFENDANT: Yes, sir. I would like to say
18 that I understand the seriousness of the crime.

19 THE COURT: Did you go over the probation report
20 with Mr. Herndon?

21 MS. SELTZER: Yes.

22 THE DEFENDANT: I understand the seriousness
23 of the crime.

24 THE COURT: When did you go over it with him?

25 MS. SELTZER: This morning.

1 He does understand the seriousness of the crime.

2 THE DEFENDANT: And I would like to say that
3 during the course of the crime I did walk into the
4 bank. I did not carry it out. I turned around and
5 I came out, if that pulls any weight with the Court.--

6 At this moment I am helping my family and
7 contributing. And I would like to stay in my home
8 to help them out as much as I can.

9 To say I am sorry would not express how I feel
10 right now about what happened, what took place. I
11 think if the Court gives me a chance I am worthy of
12 another chance. That's about it.

13 THE COURT: Do you have anything to say,
14 Mr. Seltzer.

15 MR. SELTZER: Yes. Indeed I have discussed this
16 report with Mr. Herndon.

17 It has been indeed my experience that on many
18 occasions the Probation Department is capable of
19 producing a very fine probation report. I don't deny
20 that. And I think that this report is inaccurate.
21 It is incomplete. And it makes conclusions that --

22 THE COURT: The Probation Officer has to talk
23 to the defendant and then he has to give his opinion.

24 I think I know this defendant pretty well.

25 You are making an accusation that has no basis.

1 MS. SELTZER: Your Honor, the report says that
2 he admits to attempting to rob the bank.

3 Your Honor, we had a trial on this. I feel
4 that the probation report has many inaccuracies.

5 THE COURT: Who was the probation officer?

6 MS. SELTZER: Ronald Sachs.

7 THE COURT: Is Ronald Sachs available? We will
8 have to get him up here. Second call.

9 (Short recess, then SECOND CALL.)

10 THE COURT: Ms. Seltzer, you say that there are inaccuracies
11 in this report. I want you to go over it page by
12 page and point out every inaccuracy to the Court.

13 MS. SELTZER: Yes, your Honor.

14 It is very important that the probation report
15 be 100 percent accurate.

16 There is always the possibility of the fact
17 that someone preparing the report will make an error.

18 THE COURT: Are there individual things that
19 you are pointing out in this report?

20 If you are pointing out that the report is
21 incomplete in and of itself, that is unimportant.

22 MS. SELTZER: Perhaps it would not be sufficient
23 reason but I suggest to your Honor that your opinion
24 could be swayed one way or the other by your reading
25 of this report. The report is totally inaccurate.

1 The inaccuracies are such that upon picking up this
2 report it presents a picture of this man that in no
3 way resembles Mr. Herndon.

4 We had a trial and Mr. Herndon testified before
5 your Honor.

6 THE COURT: I saw a lot of Mr. Herndon.

7 I may know him perhaps better than the
8 Probation Department.

9 You say there are inaccuracies in this report.
10 I want you to go through this report page by page.

11 * MS. BELTZER: I will start with page 3 which
12 discusses the defendant's statement admitting his
13 guilt. The charge is that he attempted a robbery
14 which was based upon intent. Your Honor, he never
15 admitted attempted robbery. That is what the report
16 says. That he admitted an attempted robbery.

17 THE COURT: Is that what he said, Mr. Sachs?

18 MR. SACHS: I don't remember exactly what the
19 defendant said. In the defendant's statement, yes,
20 it is true. The defendant admits his guilt.

21 MS. BELTZER: Mr. Herndon has never from my
22 understanding told anyone that he admitted to anything.

23 Here it says that he admits to attempting to
24 rob that bank.

25 MR. SACHS: That was the statement that was

1 made to me.

2 THE COURT: That was the statement that was
3 made?

4 MR. SACHS: Yes, your Honor.

5 THE COURT: Did he tell you that he attempted
6 to rob the bank?

7 MR. SACHS: Yes, your Honor.

8 THE DEFENDANT: No, I didn't.

9 MS. SELTZER: Your Honor, that was a misunder-
10 standing.

11 THE COURT: Misunderstanding?

12 MS. SELTZER: It is my understanding of the
13 situation that the defendant never admitted to attempt-
14 ing to rob the bank.

15 THE COURT: He did take the witness stand at
16 the time of trial.

17 MS. SELTZER: I do not know how Mr. Sachs got
18 the idea.

19 THE COURT: He just told you how he got the
20 idea. He said Mr. Herndon used those words.

21 Mr. Herndon now denies this.

22 MS. SELTZER: David Herndon admitted that he
23 walked into the bank with the intent to rob it.

24 THE COURT: Then he changed his mind. That was
25 his defense. The fact is that intent was involved.

1 Did he say that he intended, or attempted to
2 rob the bank?

3 MR. SACHS: I believe that he said he attempted
4 to rob it.

5 THE COURT: What is the second inaccuracy?

6 The first is that he started to rob the bank.
7 He walked into the bank with the intent to rob it.

8 He testified at the trial under oath, he
9 intended to do intent and nothing else. He was very
10 careful about that. His testimony was very calculated.
11 He entered the bank with the intent to rob it.
12 I just wanted to make that clear to you.

13 MS. SMITZER: Your honor, there are certain
14 errors. There is an unfair characterization by the
15 Probation Department of his family and of his relation-
16 ship with his family.

17 THE COURT: Point that out to me page by page,
18 please.

19 MS. SMITZER: Page 3. On page 3 there is a
20 discussion of Mr. Herndon's relationship with his
21 mother.

22 How can he discuss a woman who has been
23 dead now for two years. She did not come into his
24 office and talk to him.

25 This report describes Mr. Herndon's relationship

1 with his mother with many inaccuracies.

2 There are references, inaccurate references
3 by Mr. Sachs to the woman and to her relation-
4 ships with other men. The fact that she had many
5 relationships -- he has never spoken to this woman
6 who has been dead for two years and not able to
7 dispute something like that.

8 THE COURT: Now what is this --

9 MRS. SILEYER: I am sorry, but there are certain
10 errors that I must bring to the Court's attention.
11 There have been certain accusations made / about
12 the existence of a / the existence of a
13 promiscuous nature.

14 Mr. Herndon says that his mother was not a
15 prostitute. That was his description of her. He said
16 that she just fell in and out of love many times.

17 THE COURT: I think it is a slur.

18 You have just pointed out the facts that you
19 feel are inaccuracies.

20 These two facts are just their way of trying
21 to express an opinion.

22 Now you have to have some confidence in the
23 ability of the Judge to deal with what is said in the
24 report.

25 I don't care about how many lovers she had. I
did think it was important what kind of environment he

1 grew up in. If I was convinced of this, it would
2 help me to understand his present situation,

3 if I knew what his background was. If I
4 knew the kind of household that he was brought up in,
5 it would help me to understand his present situation.
6 If I knew that the household he was brought up in,
7 was quite chaotic.

8 MS. SELTZER: That is just my point. The
9 defendant says that the household was perfectly fine.

10 I wonder if the Probation Department has spoken
11 to his sister.

12 MR. SACHS: Yes, I have.

13 THE COURT: Mr. Sachs says he did speak to his
14 sister.

15 MS. SELTZER: She is very stable and a very
16 solid person. She had a very good effect on the
17 family.

18 THE COURT: I might very well understand his
19 position and I might have given him a lighter sentence
20 because of it. Mr. Herndon doesn't like it because
21 it is a slur on his mother's reputation.

22 I don't blame him for that. He is entitled to
23 that.

24 MS. SELTZER; It notes that the defendant's sister's husband
25 and this is the same sister, it identifies her husband

1 as Dan Connor, who is a criminal who is known to this
2 Court. Dan Connor is not his sister's husband.

3 He is her brother-in-law. Her husband is
4 someone else.

5 THE DEFENDANT: Robert Connor.

6 THE COURT: Robert Connor?

7 MS. SELTZER: He has no criminal record.

8 THE COURT: That may be an inaccuracy.

9 MR. SACHS: It is a possibility. There is a
10 possibility that it is a misinterpretation.

11 MS. SELTZER: Page 10, how it describes the
12 home of this man. The description here is of an
13 apartment with only the bare necessities.

14 I have never been to this apartment but as it
15 has been described to me it does not just have the
16 bare necessities.

17 This report is riddled with inaccuracies.

18 THE COURT: Were you there at the apartment
19 before you made this report? Were you there,

20 Mr. Sachs?

21 MR. SACHS: Yes.

22 THE COURT: Would you describe that apartment,

23 Mr. Sachs.

24 MR. SACHS: As it appeared in April of 1975, --

25 MS. SELTZER: Which of course means that he

A 27

1 had just moved into the home.

2 MR. SACHS: Your Honor, I had waited until the
3 last possible day before my report would be due to
4 visit his home.

5 MS. SELTZER: He had just moved in. It obviously
6 would not look very nice.

7 MR. SACHS: I waited until the last possible
8 day.

9 THE COURT: All right. Can you describe to us
10 what his home looked like?

11 MR. SACHS: There was just bare necessities.
12 There were no pictures hung on the wall. There were
13 a couple of kitchen chairs there. There was no
14 attempt to decorate the apartment at all because there
15 was --

16 MS. SELTZER: Because there were no finances.

17 MR. SACHS: I don't know about that. I am just
18 giving you my observations.

19 MS. SELTZER: You could have waited a little
20 longer.

21 MR. SACHS: I waited as long as I could. I
22 waited until the last day when the report was due.
23 The report had to be written.

24 MS. SELTZER: You have reported facts that are
25 going to be held against Mr. Herndon.

1 THE COURT: I was not going to hold it against
2 Mr. Herndon. You are suggesting it to me.

3 MS. SELTZER: This is an indication of the whole
4 attitude of this report. To go and visit his home
5 when he has just lived there for about three or four
6 weeks and hasn't had a chance to decorate it I think
7 is very unfair. I think that is the attitude of this
8 report.

9 THE COURT: When you can't think of anything
10 else, then it is attitude.

11 Go ahead, Ms. Seltzer. You are telling me
12 about inaccuracies. What is the next page.

13 MS. SELTZER: Page 12 where there is a
14 discussion of the description of Mr. Herndon's
15 relationship with drugs. ^{This} is also an inaccuracy.

16 The report on one hand indicates that he has
17 been in bi-weekly contact with the Drug Control
18 Commission of the State.

19 The Drug Control Commission has indicated that
20 he has no possible residue ^{in his urine,} except for alcohol in his
21 specimen.

22 THE COURT: Does the report contend that he is
23 taking drugs?

24 MS. SELTZER: The contention is that the nar-
25 cotics parole officer has advised us that the defendant

1 has bi-weekly contact with probation.

2 THE COURT: Did he have bi-weekly contact
3 with probation?

4 MS. SELTZER: He is in contact with that office.
5 If he used drugs there would be some trace of it in
6 his system.

7 THE COURT: How often does he have contact with
8 the parole officer?

9 MR. SELTZER: Bi-weekly?

10 THE DEFENDANT: Weekly.

11 THE COURT: He has even more contact with them.

12 MR. SELTZER: That is correct.

13 Mr. Herndon has not used any form of drugs
14 since his arrest.

15 THE COURT: Where does it say that he uses
16 drugs?

17 MS. SELTZER: On page 13: He has had weekly
18 contact with cocaine for the past four years. He has
19 a habit of approximately \$35 per week. That is their
20 version of what happened.

21 THE COURT: You are dealing with Mr. Sachs'
22 opinion.

23 MS. SELTZER: I don't know this man from their
24 description of him.

25 THE COURT: Go ahead, Mr. Sachs. Was he in

1 contact with his parole officer?

2 MR. SACHS: He was in contact not with his
3 parole officer but his parole supervisor. The super-
4 visor stated that just as I have written here that
5 the defendant admitted to having sporadically taken
6 cocaine. That is on page 1.

7 This defendant has a weekly habit of approxi-
8 mately \$35 per week.

9 THE DEFENDANT: I do not.

10 THE COURT: Now I realize that does not match
11 up with his parole office's opinion of him. That
12 is not their fault.

13 MS. SELTZER: Perhaps they did not give him a
14 proper examination.

15 THE COURT: Did you have contact with cocaine?
16 Ask him that.

17 MS. SELTZER: Did you have contact with cocaine?

18 THE DEFENDANT: I have not.

19 THE COURT: Did you tell this probation officer
20 that you had weekly contact with cocaine for the last
21 four years?

22 Do you want me to bring the parole officer in
23 and ask him, if he told Mr. Sachs that this defendant
24 had sporadic contact with cocaine?

25 MS. SELTZER: That was in the past.

1 THE COURT: Was that the past or was that up to
2 the present?

3 Do you want me to bring him in?

4 THE DEFENDANT: No.

5 THE COURT: You don't want him brought in.

6 MS. SELTZER: He says he wants to be sentenced.

7 THE COURT: He wants what?

8 MS. SELTZER: Mr. Herndon has advised me since
9 the date of his arrest that he has not gone near drugs.
10 And that is his contention up until the present time.

11 Now perhaps Mr. Sachs misunderstood him.

12 THE COURT: Perhaps Mr. Herndon was lying.

13 Is there a possibility you were lying?

14 THE DEFENDANT: I told Mr. Sachs that prior to
15 my arrest I had been using cocaine every week, bi-
16 weekly. I told him that I would get it every time I
17 got paid. I would use cocaine. That was prior to my
18 arrest.

19 THE COURT: All right. Anything else?

20 Are there any other inaccuracies?

21 MR. SELTZER: It is just the parole officer's
22 word against Mr. Herndon's. That's all it is.

23 The tests that he has taken show that he has
24 no drugs in his system. They find no drugs in his
25 system, your Honor.

1 THE COURT: How long does it take to trace
2 evidence of cocaine, of drugs in the bloodstream?

3 MR. SACHS: Cocaine I would say would have to
4 be caught rather quickly.

5 THE COURT: How long, 24 hours?

6 MR. SACHS: Yes.

7 THE COURT: Suppose a drug addict knows he has
8 a date for a test like every Friday. And let's say
9 that he knows that he is going to take the test every
10 Friday. Suppose after he took the test on every
11 Friday night he would take cocaine. Would that show
12 up when he was tested on the following Friday?

13 MR. SACHS: There is no way that it would show
14 up. It would be too late.

15 THE COURT: You did visit Mr. Herndon's home?

16 MR. SACHS: Yes.

17 THE COURT: Was it a week day?

18 MR. SACHS: It was.

19 THE DEFENDANT: Wednesday.

20 THE COURT: Are there any other inaccuracies,
21 Ms. Seltzer?

22 MS. SELTZER: Your Honor, Mr. Herndon has not
23 been using drugs. There is no way that he can prove
24 that he has not used any drugs since the time of his
25 arrest last October. That is the case also.

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1 He was sent to the Narcotics Addiction Control
2 Commission.

3 Is there anything else wrong with the report?

4 MS. SELTZER: Yes.

5 THE COURT: Where? Point it out to me.

6 MS. SELTZER: As far as employment is concerned
7 the report indicates that he has had only one employ-
8 ment or one job that the Probation Department was able
9 to verify.

10 Mr. Herndon advised me that there was a letter
11 sent to the Probation Department by his employer. He
12 has been employed since December 1974. He has worked
13 at the same place from June 1973 to January 1974. He
14 is employed in a job that concerns youngsters. His
15 extra time is uncompensated for. He recommends and
16 guides these youngsters. He is qualified and able
17 to carry out his responsibilities. I would ask
18 Mr. Sachs why he did not take that into consideration
19 when he made his report to the Court.

20 MR. SACHS: There were letters sent to these
21 people.

22 MS. SELTZER: I called the woman and I spoke
23 to her myself. She is always available. She said,
24 if I can be of service please call. She is at
25 857-8701.

1 MR. SACHS: I did call the woman who he is
2 employed by at the Probation Department.

3 MS. SELTZER: And did you speak with her?

4 MR. SACHS: She did forward that letter to us. He
5 did work as a big brother from 1968 to 1969, as a
6 child care counselor.

7 THE COURT: I received a letter stating he was
8 employed by the Probation Department Did you receive
9 that letter, Mr. Sachs? Show him the letter.
10 (Mr. Sachs examines the letter.)

11 MS. SELTZER: Your Honor, Mr. Herndon has been
12 employed. The entire probation report is full of
13 inaccuracies.

14 THE COURT: It is possible that it is. I will
15 assume that he was neglectful.

16 MS. SELTZER: Your Honor, he has been a little bit
17 more that neglectful, in view of the fact that his
18 employment has been good. He has a good work record.
19 He worked. He has worked for the N.Y.U. Law Clinic.

20 It is my responsibility as his lawyer to protect
21 the
22 my client. I have a responsibility of imparting to the
23 Court the glowing reports that I got about him. I do
24 not see any mention of that anywhere in this report. There
25 are glowing reports in that letter about my client. And
I wanted the probation report to reflect that.

1 Why didn't he contact his employer? He would
2 have heard all of the details.

3 MR. SACHS: They were contacted twice by letter.
4 They failed to respond.

5 THE COURT: Would you want me to put Mr. Sachs
6 under oath, Ms. Seltzer.

7 MS. SELTZER: I am not saying he is deliberately
8 not putting anything in here.

9 THE COURT: Oh.

10 MS. SELTZER: Your Honor, there are comments
11 about his lack of seriousness, about his attitude, or
12 lack of seriousness, and that is going to be taken
13 into account.

14 I just think that the report should have
15 included everything. There are a lot of inaccuracies.
16 He is a very serious man. I know it. I want them to
17 say that he is a very serious man. And he recognizes
18 the gravity of his offense. He is remorseful. He
19 should be probated. And I think the report should say
20 that.

21 THE COURT: That's the point.

22 MS. SELTZER: Your Honor, I am asking you to
23 take this into consideration. There is one more thing
24 that I would like to say.

25 THE COURT: Make it short.

1 MS. SELTZER: I would just like to say that
2 this report does not describe my client. I don't
3 even recognize him from this report.

4 THE COURT: The report does not comport with
5 what Mr. Herndon tells you.

6 MS. SELTZER: That's all there is to it. It
7 does not comport with a lot of the facts that I know,
8 as I know them.

9 THE COURT: You can't have it two ways.

10 MS. SELTZER: Your Honor, he does have a good
11 work record. The report says that he is not a serious
12 worker. He is employed.

13 Clearly, Mr. Sachs did not put in the glowing
14 report that I have had about my client.

15 THE COURT: He didn't have to tell me about him.
16 I know more about him than the report tells me.

17 MS. SELTZER: It is information of such a
18 nature that I was hoping it would be seen by your
19 Honor.

20 THE COURT: Has he come up with a different
21 defense?

22 After listening to Mr. Herndon testify I think
23 stated in the probation report.
24 I know more about him, than what is/ I can tell you
25 this, I know more about Mr. Herndon than Mr. Sachs
does.

1 MS. SELTZER: I am sure your Honor does. I am
2 sure of that.

3 THE COURT: I don't think the report is insig-
4 nificant.

5 The only real possibility of error is that the
6 report says that Dan Connor is the husband, and has a
7 criminal record, whereas he is the brother-in-law, and
8 not the husband of his sister. His sister's husband's
9 name is Robert Connor.

10 MS. SELTZER: There is also the fact as to
11 robbing the bank. The report says he admitted going
12 to rob the bank.

13 THE COURT: I say that is the best version of
14 it.

15 Mr. Sachs has no clear recollection of what he
16 said. He entered the bank with the intent to rob it.
17 Attempting to rob a bank is a very serious crime.

18 MS. SELTZER: I am not saying that it isn't.
19 Particularly, I am saying that it was not attempt but
20 intent. That is one of the errors in the report.
21 That is one of the inaccuracies.

22 It says on page 15 or 16 that Mr. Herndon has
23 said that the NACC was unwholesome for his welfare.

24 THE COURT: What page is that?

25 MS. SELTZER: I think it is 16.

1 MR. SACHS: 15. Then it goes on to 16.

2 MS. SELTZER: Your Honor, there is a report
3 from the supervising council at the NACC. Page 16.
4 Mr. Herndon in effect told them deliberately in effect
5 that the program was unwholesome to his welfare.

6 THE COURT: Does that affect anything else?

7 MS. SELTZER: No, your Honor.

8 THE COURT: Do you have anything else to say?

9 MS. SELTZER: I have more to say, Judge. I
10 have more to say.

11 THE COURT: Make it quick. I have a courtroom
12 full of lawyers.

13 MS. SELTZER: Yes, your Honor.

14 As you know, this was a jury trial. I know the
15 Court is aware of all of the facts.

16 THE COURT: I know it. Those are legal seman-
17 tics.

18 MS. SELTZER: But at the close of the jury trial
19 I myself spoke to some of the jurors. I had an oppor-
20 tunity to speak to some of the jurors.

21 THE COURT: I hold no stock whatsoever in what
22 jurors believe, not at all, just the verdict.

23 MS. SELTZER: But, at the time we were advised
24 that on the question of actual attempted robbery,
25 that as to if he attempted to pull out the gun, they

1 would have voted to acquit him. There was apparently
2 one juror who had been mugged at sometime or other.
3 That was the one hold-out.

4 MR. GOULD: No, I was there, too. That is not
5 true. One person gave us the standing. Maybe seven
6 of them didn't like the looks of the prosecution.

7 THE COURT: I won't even consider that kind
8 of thing.

9 I do not consider that in my appraisal of
10 Mr. Herndon.

11 I made my own appraisal of him when he
12 testified. I think he was a constant liar. He had a
13 gun, and he pointed it.

14 MR. SELTZER: Your Honor, my point is this. I
15 I disagree with you. Mr. Herndon has not lied to the
16 Court. He has not lied in this courtroom. He has not
17 interfered with the process of law.

18 It was his position and he still maintains it
19 that he went into the bank at the time that he did and
20 he intended to rob the bank.

21 THE COURT: Now, when he took the witness stand
22 and he started to testify, he wanted to make sure
23 that the jury understood that it was intent to rob a
24 bank. He wanted to make sure that they knew it was
25 intent to rob a bank. Intent to rob a bank is a

1 lesser crime.

2 Mr. Corcoran was aware of it.

3 MS. SELTZER: Your Honor, it was only on that
4 theory that Mr. Herndon took the stand.

5 THE COURT: Correct.

6 Now, when he got on the witness stand he
7 contrived to think of every way he could to offer
8 testimony concerning intent. Everything was intent,
9 everything else was considered very carefully, and
10 very carefully planned. Every chance he got
11 he tried to show intent. And in addition
12 to that he turned around and when he saw two, or three
13 or four blacks on the jury, every chance he got
14 in the testimony that when he was stopped Mr. Herndon
15 said, Don't do that, I'm your brother. And the
16 gentleman/^{who} was a security officer said,:

17 you are not a brother of mine.

18 MS. SELTZER: Your Honor, that was in the report
19 of the agent. That was not said by Mr. Herndon. It
20 was in the agent's report.

21 THE COURT: He said it. He had a perfect right
22 to .

23 But, when he took the stand he recognized he
24 was committing perjury. And he knew it. He avoided
25 carefully admitting attempted robbery in the bank.

1 And he did anything to cover that up. But when he
2 said, I am sorry, I am sorry, and he was charged with
3 attempted robbery! What he said was that
4 he intended to do that. He was attempting to rob the
5 bank.

6 MR. GOULD: Yes.

7 THE COURT: And he said that he got the idea
8 while he was in there and then gave it up.

9 So you are asking me to read this report about
10 Mr. Herndon.

11 MS. SELTZER: Your Honor, you say you saw him
12 look over at the jury. You say you saw him look right
13 at those blacks on the jury. I don't understand what
14 your Honor is getting at.

15 THE COURT: He was trying certainly to impress
16 them. We are not brothers.

17 What I mean to say is that he took every
18 occasion to bring that point up. Every time he could
19 he certainly did.

20 MS. SELTZER: Your Honor, could I just make one
21 point?

22 THE COURT: There is a courtroom full of people.
23 You have five more minutes. Then I am going to
24 impose sentence.

25 MS. SELTZER: It was his belief that the guard

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1 had seen the gun stuck in his pants pocket.

2 THE COURT: He made a point of this in his
3 testimony. He kept referring to the fact that you are
4 not my brother. He was referring to the fact that
5 he was a Jamaican, or not a Jamaican. He certainly
6 took every opportunity to point this up.

7 The point is, I don't believe his testimony.
8 Mr. Herndon certainly took every opportunity that he
9 could to bring this up while he testified.

10 There were 11 people who disagreed with you.
11 I am thinking the case of U.S. against, you know the
12 case. It is a Legal Aid case. The Legal Aid Society
13 handled that case. I added two years onto/ because
14 the defendant took the stand and lied. I am not going
15 on the crime that he committed.
16 to do that here. I am just going to sentence him/ I am
17 not going to sentence Mr. Herndon, on his ability to
18 tell the truth.

18 MS. SELTZER: The crime that he committed was
19 into the bank
20 before he walked/. Before he walked into the bank, he
21 robbery.
22 intended to commit a / He did not attempt to
23 commit a robbery. He intended to rob the bank.

22 THE COURT: But because he took the stand and
23 practically confessed to intent to rob/ the bank you
24 think he should be probated?

25 MS. SELTZER: He did confess to it.

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THE COURT: To intent. That intent would be the lesser offense.

MS. SELTZER: He admitted that he bought the toy gun, and went into the bank with intent to rob.

THE COURT: But the intent that he had stopped at that point.

MS. SELTZER: He may have attempted, but he changed his mind. He felt sick.

THE COURT: He felt sick? He changed his mind at that point when he realized that he could not get away with it.

The more we talk about it the more I recall.

MS. SELTZER: Your Honor, you know that we had a hung jury.

THE COURT: They realized that he lied. He constantly lied while he was on the witness stand.

MS. SELTZER: He did not attempt to do that. I do believe this man.

THE COURT: I cannot believe that he has been straightforward.

The second trial, the second time he did that, too. Every chance he got indeed he did that.

MS. SELTZER: He did not change his story. He has never changed his story. He has not changed his story up until today. He has never changed his story.

1 THE COURT: In light of his background, and the
2 fact that he testified, and took the stand, and avoided
3 any evidence to the point that he attempted to rob
4 the bank,--

5 MS. SELTZER: He would have pleaded guilty if
6 he had pulled the gun out.

7 THE COURT: Why? Did anybody else see the gun?

8 Do you have anything else to say before I
9 sentence Mr. Herndon?

10 MS. SELTZER: Your Honor, this is not an attempted
11 bank robbery but an intended bank robbery. He intended
12 to rob the bank which is basically a state of mind. I ask
13 that your Honor, take that into consideration.

14 I ask your Honor, to be as lenient under the
15 circumstances as you can be.

16 It seems to me that this is a far different
17 crime. It is very different for a person to walk
18 into a bank and attempt to rob it. This was something
19 different. He just intended to do it. That is a
20 state of mind. That was not the commission or the act
21 of the crime. He did not do anything.

22 Intent is a state of mind. The law defines
23 intent as a state of mind. It was only a state of
24 mind, that he wanted to go into the bank and do some-
25 thing.

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1 I would ask your Honor, to be lenient in view
2 of the facts. Also in view of the fact that he changed
3 his mind and that he didn't attempt to rob that bank.

4 THE COURT: I will assume that all that he did
5 was put people in fear of their lives.

6 MS. SELTZER: In view of that, and in view of
7 the fact that there are some inaccuracies in the
8 probation report, I would ask your Honor to be as
9 lenient as you can be with him. I think the probation
10 report is untrue. It is based solely on this defendant
11 entering a bank with intent to rob the bank.

12 THE COURT: David Herndon, on your plea of
13 guilty to the second count of the indictment I sentence
14 you to the care and custody of the Attorney General or his
15 who will
16 duly authorized representative / choose a place of
17 confinement for a term of five years under Title 18,
18 U.S.C. 4203(a)(2).

19 Is there a motion?

20 MR. GOULD: Your Honor, the Government would
21 move to dismiss Count One of indictment 75 CR 192.

22 Also, the underlying indictment which is 74
23 CR 697.

24 THE COURT: Motion granted.

25 MS. SELTZER: Your Honor, could you give the
defendant a week to surrender?

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1 THE COURT: If I had any question in my mind
2 about this at all, the other judges on the panel
3 agreed. One judge would have given him eight years.

4 THE DEFENDANT: Your Honor, may I say something.
5 I have made all of my court appearances. I do
6 have to quit my job. I have to put a few things in
7 order. Can I have a few days just to tidy up a little
8 business?

9 THE COURT: No.

10 THE DEFENDANT: I did work for the Probation
11 Department.

12 THE COURT: You knew what was going to happen
13 today.

14 THE DEFENDANT: I did not know what was going
15 to happen today. I am a community worker
16 for the Probation Department.

17 THE COURT: What do you have to do?

18 THE DEFENDANT: I have a couple of kids that
19 I have to make out reports on. Those are for jobs
20 and things like that.

21 I have a boy who is ready to go to Boy's High.
22 I just have to take him down to the Board of
23 Education.

24 THE COURT: Motion denied.

25 * * *

AFFIDAVIT OF MAILING

STATE OF NEW YORK
COUNTY OF KINGS
EASTERN DISTRICT OF NEW YORK, ss:

EVELYN COHEN _____, being duly sworn, says that on the 3rd
day of September, 1975, I deposited in Mail Chute Drop for mailing in the
U.S. Courthouse, Cadman Plaza East, Borough of Brooklyn, County of Kings, City and
State of New York, a GOVERNMENT'S APPENDIX
of which the annexed is a true copy, contained in a securely enclosed postpaid wrapper
directed to the person hereinafter named, at the place and address stated below:

Michael Young, Esq.
Federal Defender Services Unit
Legal Aid Society
26 Court Street - Room 701
Brooklyn, N.Y. 11242

Sworn to before me this
3rd day of Sept., 1975

Olga S. Morgan
OLGA S. MORGAN
Notary Public, State of New York
No. 244201985
Qualified in Kings County
Commission Expires March 30, 1977

Evelyn Cohen